APPENDIX A

Opinion of United States Court of Appeals

[SAME CAPTION]

Before:

LUMBARD, *Chief Judge*,
WATERMAN and MOORE, *Circuit Judges*.

Appeal by a Greek seaman injured on board a Greek vessel in the United States from a dismissal of his claim under the Jones Act, 46 U. S. C. §688, by the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*.

Affirmed.

HERBERT LEBOVICI, New York, N. Y. (Harold D. Safir, Lebovici and Safir, New York, N. Y., on the brief), *for plaintiff-appellant*.

EDWIN K. REID, New York, N. Y. (George D. Byrnes, Zock, Petrie, Sheneman & Reid, New York, N. Y., on the brief), *for defendants-appellees*.

JAMES M. ESTABROOK, DAVID P. H. WATSON, HAIGHT, GARDNER, POOR & HAVENS, New York, N. Y., *for Kingdom of Greece, the Union of Greek Shipowners and the Chamber of Shipping of Greece, as amici curiae*.

MOORE, *Circuit Judge:*

Plaintiff, a Greek seaman, brought suit in the Southern District of New York, relying entirely upon the Jones Act and the general maritime law of the United States. The District Court dismissed the case on the merits on the grounds that plaintiff had failed to establish the applicability of American law. From this judgment plaintiff appeals.

The sole question presented on this appeal is whether the Jones Act, 46 U. S. C. §688, and the general maritime law of the United States apply to an accident in an American port to a foreign seaman on a ship owned by a foreign corporation and flying a foreign flag, where the principal shareholder of the foreign corporation, though a foreign citizen, resides in America, and where the operations of the ship on which the injury occurred were controlled from this country.

Elias Tsakonites, a Greek citizen and domiciliary, the plaintiff-appellant, signed on as a member of the crew of the *SS Hellenic Spirit* under an agreement dated Piraeus, Greece, June 4, 1959, which provided that any claim arising from his employment was to be tried exclusively by the Greek law courts. Plaintiff boarded the *Hellenic Spirit* on June 5, 1959, at Herakleion, Crete. The ship was then on the outward leg of a voyage from Houston, Texas, to Rangoon, Burma, with numerous stops in between. After reaching Burma, the ship sailed back through the Red Sea and the Mediterranean, stopping at New York and Philadelphia before finishing its inward voyage in Cuba. The accident which gave rise to the present suit occurred while the *Hellenic Spirit* was berthed at a pier in Brooklyn. On September 26, 1959, while descending a ladder from the

main deck to the interior of a hold, plaintiff fell to the deck below. He was taken to the Lutheran Medical Center in Brooklyn, where he remained until January 20, 1960.

The *Hellenic Spirit* at all times relevant to this suit sailed under the Greek flag and was registered under the laws of Greece. Her crew and officers were almost entirely Greek. She was owned by the defendant Transpacific Carriers Corp., a Panamanian corporation wholly owned by the defendant Hellenic Lines, Ltd., a Greek corporation, over 96% of the shares of which were owned by Pericles G. Callimanopoulos, a Greek citizen, who first came to this country in 1945. From 1945 to 1956 or 1957, he spent part of his time here, first as a visitor, then as a treaty trader. In 1956 or 1957, he was admitted to the United States as a permanent resident.

With the exception of Callimanopoulos and his son, all of the officers and directors of Hellenic Lines reside in Greece as well as being Greek citizens. However, the directors from time to time vested in Callimanopoulos a broad power of attorney to run the company as General Manager.

Hellenic Lines maintains an office in Piraeus and a slightly smaller office in New York City, in addition to smaller offices in this country and abroad. In August 1959, the New York office employed 63 people at a payroll cost of approximately $28,000 per month. The company's annual statement was prepared in New York. Hellenic Lines maintains bank accounts in New York banks and has borrowed extensively from New York banks.

Hellenic Lines at the time of the accident operated from New York 22 or 23 vessels engaged in three liner services:

to the Mediterranean; to the Persian Gulf; and to the Red Sea and India and Burma. The company's agents at ports of call reported to the New York office on all matters concerning these three liner services. The *Hellenic Spirit* was engaged in the Red Sea liner service.

The starting point of any discussion of the applicability of American law to seaman's accident must be *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), in which the Supreme Court listed and appraised seven factors which should be considered in balancing the need for fairness to a plaintiff and the legitimate interests of the United States against the policies underlying international comity. Those seven factors are: the place of the wrongful act—a factor to which the Supreme Court attributed little weight, because of the disruptive effects adherence to such a standard would have upon the uniform regulation of shipboard activities;[1] the law of the flag, which factor, the Supreme Court said, must prevail in the absence of some "heavy counterweight," and which generally accords with principles of comity; the allegiance or domicile of the injured party; the allegiance of the defendant shipowner; the place and terms of the contract; the relative inaccessibility of the foreign forum, a factor which the Court found relevant not on the issue of

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[1] See *Romero* v. *International Term. Co.*, 358 U. S. 354, 384 (1959):

> "To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the express policies of this country. The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury."

which law is applicable but rather on whether the court after finding its own law inapplicable should apply the law of some other jurisdiction; and finally the law of the forum, to which the Court attributed very little weight.

Lauritzen did not attempt to indicate whether or not American law should apply under all combinations of listed factors not before the Court. Cases both before and after *Lauritzen,* however, have established that certain combinations of factors either are or are not enough to justify application of American law. See Note, Admiralty Choice of Law: *Lauritzen* v. *Larsen* Applied, 47 Va. L. Rev. 1400 (1961).

The present case presents a combination of factors the significance of which is not conclusively established by existing cases. Defendants contend, and the trial court held, that the record reveals no factors "establishing a connection with the United States . . . sufficient to outweigh the 'venerable and universal rule' " which gives cardinal importance to the law of the flag, *Tjonaman* v. *A/S Glittre,* 340 F. 2d 290, 292 (2d Cir.), *cert. denied,* 381 U. S. 925 (1965). Plaintiff is an alien, who is not even an American resident. His employment contract by its terms limits his rights to those arising under Greek law—a factor to which weight must be given because it represents plaintiff's jurisdictional choice. Nor can, in this case, the Greek flag of the *Hellenic Spirit* be said to be a "flag of convenience," within the meaning of cases like *Bartholomew* v. *Universe Tankships Inc.,* 263 F. 2d 437, 440 (2d Cir.), *cert. denied,* 359 U. S. 1000 (1959), and *Southern Cross SS Co.* v. *Firipis,* 285 F. 2d 651 (4th Cir. 1960), *cert. denied,* 365 U. S. 869 (1961). The *Hellenic Spirit* had contacts with Greece

apart from being registered there and flying its flag. It stopped there to pick up crews, and not infrequently to discharge cargo. The officers and directors of the company which owned the ship were Greek, as were all of the shareholders of the parent company Hellenic Lines. Greece certainly has enough contacts with the ship so that our courts should hesitate out of considerations of comity before applying and foisting upon it the heavy potential liabilities of the American law of maritime personal injuries. Cf. *McCulloch* v. *Sociedad Nacional de Marineros de Brazil,* 372 U. S. 10 (1963) (National Labor Relations Act does not apply to maritime operations of ships owned by foreign subsidiaries of American corporations, crewed by alien seamen).

In favor of jurisdiction are the facts that plaintiff was injured here and spent almost four months in an American hospital; that the headquarters of the ship's activities were located here; and that the general manager and 96% shareholder, although a Greek citizen, is a permanent resident here. The few courts which have previously passed upon the problem have attached considerable significance to the base of business operations, see *Southern Cross SS Co., supra,* and *Pavlou* v. *Ocean Traders Marine Corp.,* 211 F. Supp. 320, (S. D. N. Y. 1962) (provision in contract between Greek seaman and Liberian corporation owned by Greeks, Canadians and Americans, stating that Greek law governs), as well as to the residence of the ultimate owners, *id.* But cf. *Cruz* v. *Harkna,* Admiralty No. 176-315, S. D. N. Y., Feb. 24, 1954 (Honduran law applies despite fact that some of ship's owners, all of whom were Estonian refugees, resided in America).

Wherever, as here, there are various factors to be weighed for and against jurisdiction, the decision must be controlled by the more weighty. This court in its recent *Tjonaman* decision, *supra*, faced a similar problem and resolved it against jurisdiction in our courts. The Supreme Court has given no indication that the law of the flag (when not a flag of convenience) is still not to be considered of paramount importance. Also not to be ignored, is the fact that this Greek seaman whose residence is in Greece, who is or is not presumed to be familiar with the rights and privileges under Greek law of those who serve in the crew on Greek ships, signed articles in which he agreed to be subject to those laws. He doubtless did not have the slightest knowledge of the provisions of American statutes enacted for the benefit of American seamen by our Congress for their protection. It is not unfair to have him abide by his agreement. As said by the Greek government in its *amicus* brief with respect to these agreements: "These collective bargaining agreements contemplate the hiring of Greek seamen under Greek law aboard Greek flag vessels, and contemplate the payment to these seamen, in the event they are injured, of benefits under Greek law and in accordance with the Greek social welfare programs." International comity requires respect for such agreements.

Although plaintiff argued here that his right to a jury trial was violated by the district judge deciding the case on the basis of stipulated facts, we think it was clear that he agreed to have the issue of the application of United States law decided on the stipulations.

Dismissal affirmed.

WATERMAN, *Circuit Judge* (dissenting):

I respectfully dissent.

To me the present case presents a combination of factors that justifies the application of United States law rather than the municipal law of another nation. To be sure, the suit has been brought by a Greek alien seaman injured while serving aboard a vessel of foreign registry and ownership. But the accident occurred in the territorial waters of the United States while the S.S. Hellenic Spirit was berthed at the 57th Street pier, Brooklyn, New York. Furthermore, Hellenic Lines, Ltd., the foreign shipowner, has a substantial executive office in the United States, from which extensive ship operations are conducted. And, in my view, it is of the greatest importance that Callimanopoulos, the general manager of Hellenic Lines and the owner of more than 95% of Hellenic Lines stock, has regularly resided in the United States since 1945 and has enjoyed the status of a permanent resident alien here since 1956 or 1957.

United States courts have pierced through the facade of foreign registration and foreign incorporation and have applied United States law, including 46 U. S. C. §688 application, when American-based shipowners who are United States citizens have sought the protection from seamen's suits of less onerous laws of foreign states and have registered their vessels elsewhere than here. E.g., *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 and cases cited at 442 (2 Cir.), *cert. denied*, 359 U. S. 1000 (1959). I would hold that here, in this case, where the injury occurred at

dockside in the United States, United States law should be applied when the defendant shipowner, though an alien, has continued to register his vessels abroad while he currently enjoys the considerable benefits of permanent resident alien status here, a status deliberately sought by him.[1] I cannot follow the argument that, in this respect, the application of United States law to this event that occurred in our territorial waters should depend upon whether the vessel upon which the event occurred is owned by a United States citizen or is owned by a United States resident alien. We accord a lawful permanent resident alien the same constitutional protections we accord a citizen of the United States. See *Kwong Hai Chew* v. *Golding*, 344 U. S. 590, 596 (1953). Moreover, the duties and obligations of a resident alien have not been thought to "differ materially from those of native-born or naturalized citizens." *Leonhard* v. *Eley*, 151 F. 2d 409, 410 (10 Cir. 1945). To be sure, a resident alien in some respects does not have legal parity with a United States citizen; for example, the Constitution requires that only citizens may be candidates for election to the House of Representatives and to the Senate; and an alien may be sued in any U. S. judicial district. Nevertheless, established authority, see, e.g., *Leonhard* v. *Eley, supra*, suggests that any United States law,

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[1] In the present case the fact that the defendant, Hellenic Lines, Ltd., is incorporated in Greece does not successfully disguise the fact that the corporation is almost solely owned by a single individual and that that individual is a resident alien in the United States. This case does not involve the applicability of our law to a corporation publicly owned by many individuals permanently residing in several different countries or even in one such country.

such as the Jones Act, that imposes duties and obligations upon persons, should be evenly applied to United States citizens and resident aliens.

So, unless the same obligations that United States law imposes on shipowners who are United States citizens are imposed on resident alien shipowners, a resident alien shipowner like Callimanopoulos will be able to enjoy the considerable benefits of lawful permanent resident alien status in this country without being subject to the duties and obligations exacted of an otherwise similarly situated competitive shipowner who is an American shipowner. The statement of this last proposition would seem to be enough to require a reversal instead of an affirmance of the order below. Moreover, under these circumstances, I do not regard as significant the fact that when this Greek seaman signed on he agreed to limit his rights to those arising under Greek law. Surely we would not consider such to be decisive, or even important, if the shipowner behind the Greek-incorporated corporation was a United States citizen inasmuch as the accident occurred while the vessel was berthed at a New York harbor pier.

I repeat: Shipowners who are resident aliens and shipowners who are United States citizens should be subject to the same liabilities for injuries suffered by their employees on their vessels when the vessels are at United States piers. If a United States shipowner is liable under the Jones Act to a foreign seaman serving on a foreign-registered vessel injured in our territorial waters, a permanently resident alien should also be so liable.

I find no reported case denying a seaman his recovery in which the significant factors are enough similar to this

case to require us to affirm the order below. In major part I agree with the exhaustive discussion of the authorities in the majority's opinion. Unlike the majority, however, I am not persuaded that here the ship had enough contacts with Greece so that we should hesitate "before applying and foistering upon [Callimanopoulos] the heavy potential liabilities of the American law of maritime personal injuries."

I would reverse the order below dismissing the action and remand for further proceedings.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

[SAME CAPTION]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order of the United States Court of Appeals Denying Reargument and Rehearing In Banc

[SAME CAPTION]

PETITION FOR REHEARING

LEBOVICI AND SAFIR, New York, N. Y., for plaintiff-appellant.

Petition denied.

J. E. L.
L. P. M.
U.S.C. JJ.

I dissent and would grant the petition.

S. R. W
U.S.C. J.

Dec 28 1966

[SAME CAPTION]

PETITION FOR REHEARING IN BANC

LEBOVICI AND SAFIR, New York, N. Y., for plaintiff-appellant.

All of the active judges concurring, except Judges Waterman, Smith and Hays, who vote to grant, the petition for rehearing in banc is denied.

J. EDWARD LUMBARD
Chief Judge

APPENDIX D

Opinion and Order of Hon. Irving Ben Cooper, U. S. D. J., Dated March 4, 1965

[Same Caption]

Irving Ben Cooper, *D.J.*

This suit arises out of personal injuries allegedly sustained by plaintiff.

Trial began on February 1, 1965. The parties then agreed in open court to divide the trial into two stages, (1) a determination by the Court whether the Jones Act (46 U.S.C. §688) and the general maritime law (hereafter American law) are applicable, and (2) a resolution (if necessary) by the Court and jury of liability of damages.

Accordingly, the parties stipulated to facts relating to the issue of applicable law. These, relied upon by plaintiff to "make out a prima facie case" [see Transcript of Trial Proceedings (hereafter Transcript), February 1, 1965, p. 4], or more accurately, to be the basis of the Court's determination whether American law applies, were made part of the record as Court's Exhibit 1.

After oral argument, the parties submitted supplementary trial memoranda (in accord with leave of Court to do so until the close of the Court's day on February 3). Subsequently, a retyped copy of Court's Exhibit 1 was marked Court's Exhibit 2 and supporting exhibits were jointly marked Court's Exhibit 3.

On February 4, defendants belatedly attempted to submit proof of Greek law in order to show that a foreign forum was accessible and foreign law would accord plaintiff re-

lief. See *Panagiotis Evangelinos* v. *Andrevapor Cia. Nav., S.A. and the S.S. National Hope,* 2 Cir., 1961, 291 F. 2d 624. This offer was rejected by the Court in view of its untimeliness. (See Transcript pp. 1-11). Moreover, without regard to enforceability or applicability, stipulation 45 states that Greek law provides rights and remedies to Greek seamen injured aboard a Greek vessel. See *Kontos* v. *S.S. Sophie C.,* E.D. Pa., 1964, 236 F. Supp. 664.

Plaintiff did not plead or request, either on oral argument or in his memoranda, that the Court take judicial notice or accept proof on foreign law so that any rights thus accorded plaintiff could be remedied in this forum should American law be found inapplicable. Plaintiff has not requested that the general maritime claims be transferred to the Admiralty Docket.

Plaintiff has chosen to stand on American law. We thus direct our attention to the basic issue of whether there are sufficient facts before this Court to justify the application of American law.

Applicability of American Law

The Court has carefully reviewed Court's Exhibit 1-3, the parties' memoranda and the applicable law. There is no need to fully reiterate the detailed stipulations of fact.

Briefly, plaintiff is a Greek citizen and domiciliary who served as a seaman abroad the S.S. Hellenic Spirit. He claims damages for personal injuries allegedly sustained aboard the vessel on September 26, 1959, in New York harbor, as a result of defendants' negligence and the unseaworthiness of the ship. He also seeks wages until the

end of the voyage, maintenance and cure, and recovery for wilful failure to treat and provide maintenance. These latter claims cover, in part, a period after plaintiff returned to Greece.

The S.S. Hellenic Spirit, owned by defendant Transpacific Carriers Corp. (hereafter Transpacific), a Panamanian corporation, was operated and controlled by defendant Hellenic Lines, Ltd., (hereafter Hellenic), a shipping concern incorporated under the laws of Greece. She flew the Greek flag.

Despite admitting by paragraph 4 of its amended answer that it employed plaintiff, Transpacific contends that plaintiff was in fact employed by Hellenic (see stipulations 41-2, and supporting exhibit 8 in Court's Exhibit 3). We agree. Neither Hellenic nor plaintiff now appear to contend otherwise.[1]

We cannot find, as plaintiff contends, that the S.S. Hellenic Spirit was a "runaway vessel"—one operated under a flag of convenience. In *Lauritzen* v. *Larsen,* 1953, 345 U.S. 571, the Supreme Court noted that some American shipowners sought foreign registration of their vessels for

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[1] Plaintiff's complaint bases jurisdiction solely on the Jones Act. The finding of an employer-employee relationship is necessary to establish a claim on which relief thereunder can be granted. See 2 Norris, The Law of Seamen §§666, 682. Failure of plaintiff to prove such a relation requires dismissal of the Jones Act claim [and the pendent maritime claims] as against Transpacific. See *Romero* v. *International Terminal Operating Co.,* 1958, 358 U.S. 354; *Batholomew* v. *Universe Tankships, Inc.,* 2 Cir., 1958, 263 F. 2d 347, 443. Even if Transpacific were plaintiff's employer, American law would be inapplicable. See *Kontos* v. *S.S. Sophie C., supra,* p. 3, p. 17 *infra.* This would be equally true as to the maritime claims had diversity jurisdiction, belatedly argued by plaintiff, been found to exist. See p. 16 *infra.*

the purpose of avoiding American law. Court have had no difficulty disregarding paper maché formalities of nominal foreign registration to enforce against American shipowners or operating companies the obligations created by American law. Thus, the Jones Act was applied in *Bathlomew* v. *Universe Tankships, Inc.*, 2 Cir., 1958, 263 F. 2d 437, cert. denied, 1959, 359 U.S. 1000, where American citizens were the shareholders of a Panamanian corporation which in turn held the stock of defendant shipowner, a Liberian corporation; in *Carroll* v. *United States,* 2 Cir., 1943, 133 F. 2d 690, where the vessel was owned by the United States whose agent operated it under a Panamanian flag; and *Gerradin* v. *United Fruit Co.,* 2 Cir., 1932, 60 F. 2d 927, where the vessel, owned by a New York company, was operated by a New Jersey corporation as demise charterer under a Honoduran flag.

While each case must be decided on its own facts, these cases teach that beneficial ownership and control of the vessel by American citizens or corporations will be given legal significance despite schemes, however complex or imaginative, to avoid American laws through the formalities of foreign registration and operation. See also: *Southern Cross SS. Co.* v. *Firipis,* 4 Cir., 1960, 285 F. 2d 651, cert. denied, 1961, 365 U.S. 869; *Bobolakis* v. *Compania Panamena San Gerassimo, S.A.,* S.D.N.Y., 1958, 168 F. Supp. 236; and *Zielinsky* v. *Empress Hondurena De Vapores,* S.D.N.Y., 1953, 113 F. Supp. 93.

At the outset, we cannot find that Hellenic's Greek incorporation or the vessel's flying of the Greek flag are mere formalities.

Appendix D—Opinion and Order of Hon. Irving Ben Cooper, U. S. D. J., Dated March 4, 1965

We reject the implication made by plaintiff on oral argument and in his supplementary memorandum that contacts with the United States sufficient to treat a foreign corporation as American for jurisdictional purposes under 28 U.S.C. 1332(a) (2) would also require a finding of contacts substantial enough to treat a foreign corporation as American for Jones Act purposes. See *Batholomew* v. *Universe Tankships, Inc., supra,* 263 F. 2d at 442.

Hellenic had significantly more than formal business activities in Greece and other foreign countries. See stipulations 12, 13, 14, 18, 19, 34, 36, 37.

The S.S. Hellenic Spirit was operated in the Red Sea Service (stipulation 17.) Red Sea Service vessels call at Greek ports to crew the vessels (as in this case) and to load or discharge available cargo (stipulation 18). It is true that the ship's itinerary during the voyage in question does not show that it carried cargo to or from a Greek port, but in view of the total circumstances in this case, that is insufficient to regard its Greek flag as illusory. Cf. stipulation 40.

Even had plaintiff shown the registration of the vessel under Greek law to be but a formality, nothing in the stipulations supports plaintiff's contention that each of the defendants was "entirely controlled and operated by citizens of a state of the United States." (Complaint, ¶5).

This is not a case such as *Voyiatzis* v. *National Shipping & Trading Corp.,* S.D.N.Y., 1961, 199 F. Supp. 920, wherein a Greek seaman was entitled to Jones Act remedies in a suit against a Panamanian corporation, which was the shipowner and all of whose stock was owned by a United

States citizen, and against a Delaware corporation, its general agent.

Nor does this case require the Court to state that either stock ownership of the corporation owning the vessel by United States citizens, or control of the vessel by United States citizens, standing alone, requires application of American law. See Plaintiff's Supplementary Trial Memoranda, Point III, pp. 11-12; *Batholomew* v. *Universe Tankships, Inc., supra,* 263 F. 2d at 440, 443 n. 4; *Mpampouros* v. *Steamship Auromar,* D.C. Md., 1962, 203 F. Supp. 944.

While Mr. Pericles Callimanopulos, Hellenic's general manager and owner of 95% of its stock, was a legal resident of the United States at the time of the accident in suit, he was ineligible for American citizenship and had not declared an intention to apply when and if eligible. He was a Greek citizen, as were all of the officers and directors of Hellenic. Except for Mr. Callimanopulos and his son, those officers and directors all resided in Greece.

By analogy, plaintiff cites *Gambera* v. *Bergoty,* 2 Cir., 1942, 132 F. 2d 414, where the seaman's legal residence in the United States, without actual American citizenship, was apparently accorded significance in determining to apply the Jones Act. Like other pre-*Lauritzen* cases, the controlling considerations in the decision were unclear. Indeed, in *O'Neill* v. *Cunard White Star, Ltd.,* 2 Cir., 1947, 160 F. 2d 446, the Jones Act was held inapplicable despite seaman's long residence in the United States. In *Taylor* v. *Atlantic Maritime Co.,* 2 Cir., 1950, 179 F. 2d 597 at 600, Judge Learned Hand suggest that *Gambera* and other cases can be explained by looking to the situs where the seaman signed onto the vessel, a factor given little weight

in post-*Lauritzen* cases and a contact absent here. See *Berendsen* v. *Rederiaktiebolaget Volo,* 2 Cir., 1958, 257 F. 2d 136; *Smith* v. *Furness Withy & Co.,* S.D.N.Y., 1953, 119 F. Supp. 369; Boczek, Flags of Convenience, 180-182 (1962); Note, "Admiralty and Choice of Law: Lauritzen v. Larsen Applied," 47 Va. L. Rev. 1400 (1961).

Whatever may be the vitality of cases giving weight to a seaman's legal residence in the United States, despite foreign citizenship, none has been found piercing the citizenship of foreign nationals who reside here and own controlling stock in a shipping concern incorporated under the laws of a foreign country.

On the facts of this case, we would not be justified in holding that there is "American ownership and/or control" of Hellenic sufficient to support a finding that the S.S. Hellenic Spirit flew a flag of convenience. See *Lauritzen* v. *Larsen,* 345 U.S. at 381; *Cruz* v. *Harkna,* S.D.N.Y., 1954; unreported memorandum, #21103, Admiralty Docket No. 176-315, noted in 122 F. Supp. 288.

We turn to the principles enunciated in *Lauritzen* v. *Larsen, supra,* to determine the applicable law. There, after a statement of general principles, 345 U.S. at 582, the Court considered "several factors which, alone or in combination, are generally conceded to influence choice of law to govern . . . a maritime tort claim." Listed and discussed were: (1) the place of the wrongful fact; (2) the law of the flag; (3) allegiance or domicile of the injured party; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum and (7) the law of the forum. Of these factors, those numbered (2), (3) and (4) were accorded particular significance.

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Plaintiff, however, would have us adopt the approach employed in *Bartholomew* v. *Universe Tankships, Inc., supra.* In *Tjonaman* v. *A/S Glittre,* 2 Cir., — F. 2d, —, sl. op. 677-82 (decided January 11, 1965), the Court of Appeals for the Second Circuit noted that *Bartholomew* had not limited its broad discussion of approach to the flag of convenience case then before the Court. Moreover, *Bartholomew* did consider and apply the *Lauritzen* factors in the context of the "substantial contacts" test it developed.

Brillis v. *Chandris (U.S.A.) Inc.,* S.D.N.Y., 1963, 215 F. Supp. 520, 522 and *Pavlou* v. *Ocean Traders Marine Corp.,* S.D.N.Y., 1962, 211 F. Supp. 320, 324, had interpreted *Bartholomew* as limiting the dominating importance of the law of the flag to cases with facts similar to the *Lauritzen* case. The Court of Appeals, however, found that *McCulloch* v. *Sociedad Nacional,* 1963, 372 U.S. 10, leave "no doubt" that the starting point of weighing and evaluating the factors governing the choice of law is consideration of the law of the flag.

In *Lauritzen* v. *Larsen, supra,* the Supreme Court said that

> Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag.

In *Tjonaman, supra,* the Court of Appeals stated, as the ultimate issue,

> . . . whether the substantiality of other existing factors establishing a connection with the United

States is sufficient to outweigh the "venerable and universal rule."

In this case, we find that they are not.

Here, defendants point to: (1) the vessel was flying the Greek flag; (2) Hellenic is a bona fide Greek corporation, all of whose stock is owned by Greek citizens; (3) plaintiff, a Greek citizen, who boarded the vessel at a Greek port, signed an employment contract at Piraeus, Greek, specifying it was governed exclusively by Greek laws and providing for any claims arising under the agreement to be tried exclusively by the Greek Law Courts; and (4) although plaintiff would not stipulate as to enforceability or applicability Greek law provides certain rights and remedies to Greek seamen injured aboard a Greek vessel.

Plaintiff, on the other hand, says the law of the flag and other relevant factors are outweighed by the substantiality of the facts that (1) the accident occurred in territorial waters of the United States; (2) the effective control of the vessel on which plaintiff was injured was by legal residents of the United States through Helleinic; (3) Hellenic's executive office in New York carried on and centralized extensive business operations in this country and held accountable its agents abroad.

We note first that had other operative facts entitled plaintiff to invoke the benefits of American law, an agreement relinquishing or waiving such rights would not necessarily be given legal effect. See *Southern Cross SS. Co.* v. *Firipis, supra; Pavlou* v. *Ocean Traders Marine Corp., supra;* and *Voyiatzis* v. *National Shipping & Trading Corp., supra.*

Next, the fact that the accident occurred in territorial waters is entitled to little weight. As the Supreme Court noted in *Romero* v. *International Terminal Operating Co.*, 1958, 358 U.S. 354, 384.

> In *Lauritzen* v. *Larsen* the injury occurred in the port of Havana and the action was brought in New York. Romero was injured while temporarily in American territorial waters. This difference does not call for a difference in result. . . . The test of location of the wrongful act . . . is of limited application to shipboard torts . . . because of the variety of legal authority over waters she may navigate . . . [s]uch a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations.

It was purely fortuitous that the accident occurred here rather than in Cienfuegos, Cuba, where the voyage terminated, or on the High Seas, en route to Calcutta.

Plaintiff's second and third points merit deeper consideration. We have already discussed why the facts here do not warrant piercing the corporate veil and then looking behind the Greek citizenship of Hellenic's stockholders, officers and directors. Plaintiff, however, urges that the effective control of Hellenic by a legal resident of the United States, coupled with Hellenic's business activities here generally, are "substantial contacts" under the doctrine of *Bartholomew* v. *Universe Tankships, Inc., supra,* especially when considered in its application in *Pavlou* v. *Ocean Traders Marine Corp., supra.*

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In *Pavlou*, the Court did say that "the base of operations of persons directing the operations is a factor making the Jones Act applicable." However, the Court there found that the management of the vessel, which was flying a Liberian flag and owned by a Liberian corporation created for that purpose, had been turned over to a company which operated as and was in fact a domestic corporation of the State of New York.

Pavlou, moreover, relied on *Southern Cross SS. Co.* v. *Firipis, supra*, a Fourth Circuit flag of convenience case wherein American citizens were stockholders beneficially interested in the operation of the vessel—a factor definitely not present here.

Finally, the vitality of *Pavlou* in diluting the weight to be given the law of the flag was diminished in *Tjonaman* v. *A/S Glittre, supra*, as stated above.

In *Lauritzen*, emphasis was not given to the "base of operations" factor. Respondent there had put stress on the assertion that the petitioner's commerce and contacts with the United States were frequent and regular, thus sustaining a basis for applying the Jones Act. The Supreme Court responded that (345 U.S. at 581):

> . . . [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limits of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international commerce by sea. Hence the courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality.

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Moreover, maritime law

> . . . in such matters as this does not seek uniformity. . . . [I]t aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain each nation will claim as its own. [345 U.S. at 582.]

So it is here, for even though we give full consideration to the "base of operations" factor as presented by the circumstances in this case, and view the other contacts with the United States, their totality is insufficient to outweigh "the most venerable and universal rule" that the law of the flag controls matters relating to the internal economy or discipline of the ship. See *Tjonaman* v. *A/S Glittre, supra; Mpampouros* v. *Steamship Auromar, supra.*

JURISDICTION

We note in passing that defendants contend we are without jurisdiction.

Plaintiff asserts a substantial claim under the Jones Act. As stated in *Romero* v. *International Terminal Operating Co., supra,* 358 U.S. at 359:

> . . . Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights. "A cause of action under our law was asserted here, and the court had the power to determine whether it was or was not well founded in law and in fact." *Lauritzen* v. *Larsen,* 345 U.S. 571, 575.

Had the Jones Act been applicable, this Court would have regarded the claims under the general maritime law as

"pendent." See *Romero* v. *International Terminal Operating Co., supra.*

Although neither raised nor pleaded in oral argument, plaintiff's pre-trial and supplementary trial memoranda assert jurisdiction by reason of diverse citizenship of the parties. Plaintiff argues that, assuming the Court inquires and finds defendants to have their principal place of business in New York, they must be deemed citizens of New York under 28 U.S.C. §1332(c).

This argument cannot be sustained. 28 U.S.C. §1332 (c) does not apply to foreign corporations. *Eisenberg* v. *Commercial Union Assur. Co., S.D.N.Y.*, 1960, 189 F. Supp. 500; *Chemical Transportation Corp.* v. *Metropolitan Petroleum Corp.*, (unreported opinion) S.D.N.Y., November 13, 1964, Civil Docket No. 150-55. See 1 Moore's Federal Practice §0.77[2.-3].

Conclusion

On the basis of the above opinion and in view of the facts adduced at the first stage of the trial, both quantitatively and qualitatively, we find insufficient contacts with the United States to justify application of the Jones Act.

Since Jones Act jurisdiction is the only jurisdiction invoked by plaintiff, our finding of inapplicability of the Jones Act requires dismissal of the "pendent" claims under the general maritime law.

Alternatively, as to the "pendent" claims, even had diversity existed, under the doctrine in Romero, we find insufficient contacts with the United States to justify application of the general maritime law.

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In view of plaintiff's reliance on American law, foreign law having been neither pleaded nor asserted as a basis of relief, and no other jurisdictional ground appearing to the Court, the complaint, on the above opinion, is dismissed on the merits.

Submit order promptly on three (3) days notice.

New York, New York
March 4, 1965

IRVING BEN COOPER
United States District Judge